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FILED
OCT 9 1973

Supreme Court of the United States

October Term, 1973

No. 72-1641

GEOFFREY MICHAEL AVERY,
Petitioner,

- versus -

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

ON PETITION FOR A WRIT OF CERITORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gardner W. Beckett, Jr.
NELSON, BECKETT, NELSON & THOMAS
52 Sixth Street South
St. Petersburg, Florida 33701
Attorney for Petitioner

PETITIONER'S REPLY BRIEF

I

The Solicitor General agrees that the Fifth Circuit's affirmance of petitioner's conviction in this case directly conflicts with the First Circuit's decision in *Fargnoli,* in which a conviction was reversed "[o]n facts not materially different from those here" (Resp. brief, page 5). Nevertheless the government opposes a grant of certiorari. Petitioner's sentence includes imprisonment. One of the reasons Congress vested certiorari jurisdiction in this Court, no doubt, was so that a man's freedom would not depend upon where in the United States he happened to live. A grant of certiorari to prevent this result is clearly indicated.

Going to the merits as a further basis for its contention that certiorari should not be granted, the government argues that the Fifth Circuit's position in this conflict is the correct one (page 6), thereby inviting this Court to dispose of the case on the merits without appearing to do so. If the Court is thus to reach the merits, there is no reason why its judicial labor should not be recognized by the regular procedure of a grant of certiorari followed by the publication of its decision on the merits. Therefore, certiorari should be granted.

II

With regard to the merits, to which the government has addressed itself, the critical point generating the conflict between the Circuits is included in that portion of the First Circuit's opinion which the government has quoted (page 5). It reads:

> ". . . we think it manifest that the 'non-religious' claim would have been rejected prior to *Welsh* . . ." (A-32)

It is this issue—whether or not a purely moral and ethical ("non-religious") claim would have been rejected prior to *Welsh*—which the Fifth Circuit failed to identify and decide, although petitioner's claim was a pre-*Welsh*, purely moral and ethical claim. Instead the Fifth Circuit, both in this case and its prior decision in *Taylor*, erroneously assumed that if the defendant had asked his local draft board prior to *Welsh* whether or not the statutory phrase "religious training and belief" included purely moral and ethical ("non-religious") beliefs, the draft board would have advised him that it did. This is manifest from the portion of the opinion in *Taylor* quoted (page 3) by the government, and reading:

> "Taylor . . . made no real effort to ascertain the actual requirements of the classification despite the ready availability of information and advice at the local board." (A-14)

In fact, as is hereafter discussed in Part "III", the local draft boards of the country did not know the "actual requirements of the classification" and the "advice" which they had been instructed to give was incorrect.

In the record in this case (Defendant's Exhibit No. 2. There is no transcript and hence no page number.), as in the record in *Fargnoli*, there is a statement of the pre-*Welsh* position of the Selective Service System authored by General Lewis B. Hershey, its director at that time. The First Circuit court in *Fargnoli* quoted a part of that statement as follows:

> "To be entitled to a classification as a conscientious objector, the registrant's objection to military service must be by reason of religious training and belief. The definition of 'religious training and belief' comports with a standard or

> accepted understanding of the meaning of religion in American society . . . . However, the use of the word ['religion']in connection with the selective service law was not intended to be inclusive of morals, or of devotion to human welfare or of policy of government . . . ." [Footnotes omitted] L. Hershey, D. Omer & E. Denny, Legal Aspects of Selective Service 12 (1969 ed.) (manual for government appeal agents). (A-31)

From this the First Circuit correctly concluded that under pre-*Welsh* Selective Service policy, a claim for conscientious-objector classification on purely moral and ethical ("non-religious") grounds "would have been rejected" by a local board and that "for registrants with such beliefs *Welsh* was a dramatic change" of which they were entitled to take advantage retroactively (A-32), and granted relief accordingly. The Fifth Circuit, on the other hand, failing to consider this issue, held Taylor and petitioner each criminally responsible because he did not timely claim an exemption which his local draft board was not then authorized to grant.

The Court below erroneously relied upon the *Welsh* and *Seeger* (United States v Seeger, 380 US 163 (1965)) decisions as a basis for its assumption that if Taylor had consulted his local draft board he could have learned "the true status of his claim." (A-15). The court overlooked the fact, however, that in 1969 when Taylor made his decision (A-11), and in 1968 when petitioner Avery made his decision (A-8), *Welsh* (1970) had not been decided. *Seeger* had been on the books since 1965, but the court also overlooked the fact that it was the position of the Selective Service System that the 1967 Amendment to the draft law had negated any effect *Seeger* otherwise

might have had on this issue. (Defendant's Exhibit No. 2, Hershey, "Legal Aspects of Selective Service," para 14, pp 12-14; Defendant's Exhibit No. 5, Tarr, Curtis W., "Selective Service and Conscientious Objectors," ABA Journal, Vol 57, October, 1971 p 977, 978-9). The *Fargnoli* court, on the other hand, correctly noted that the Selective Service System had disregarded *Seeger* on this issue (A-31) and that the "dramatic change" did not occur until 1970 in *Welsh* (A-32).

III

This case, like *Taylor* before it in the Fifth Circuit and *Fargnoli* in the First Circuit, results from what might be characterized as a judicial gloss upon, if not a judicial alteration of, the meaning of the words "religious training and belief." This gloss, or alteration, was made in *Welsh* for constitutional reasons therein set forth. Indeed, as the First Circuit's previously quoted language indicates, that court concluded in *Fargnoli* that the definition of the word "religious" had been so expanded by *Welsh* as to include subject matter previously considered "non-religious." This was the result predicted by Mr. Justice Harlan in his concurring opinion in *Welsh* when he stated:

> "Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions and . . . cults that represent schools of thought."
> Welsh v United States, (1970) 398 US 333 at 354, 26 L Ed 2d 308 at 326.

It is noteworthy that Welsh himself understood the limiting effect of the word "religious" and achieved his legal victory by striking out from his Selective Service application form the words "my religious training and" so that it read "I am, by reason of ~~my religious training and~~ belief, conscientiously opposed to participation in war in any form." *Welsh,* US text 336-7, L Ed text at 317. By reversing his conviction for constitutional reasons this Court in effect declared that Welsh had correctly disregarded the word "religious" as "so plastic in meaning . . . that any asserted and strongly held belief satisfies its requirements." (Harlan, J., US text at 452, L Ed text at 325-6). Mr. Justice Black, speaking for himself and three other members of the Court stated:

> "But very few registrants are fully aware of the broad scope of the word 'religious' as used in §6(j), and accordingly a registrant's statement that his beliefs are non-religious is a highly unreliable guide for those charged with administering the exemption."
> US text at 341, L Ed text at 319-20

Thus petitioner, Taylor, Fargnoli (more accurately, the Fargnoli brothers, John and Joseph), General Hershey and Welsh all understood from the plain meaning of the words that the statutory phrase "religious training and belief" literally excluded purely moral and ethical claims from the conscientious objector classification. The dissenting opinion in *Welsh* in which the Chief Justice, Justice White and Justice Stewart joined, stated flatly that the decision

> ". . . exempts from the draft a class of persons to whom Congress has

expressly denied an exemption . . ."
US text 368, L Ed text 334.

It is ironic that petitioner, like Taylor before him, should be in his present predicament, not from ignoring the instructions of his local draft board, but from having relied upon its printed forms as being correct, when, as Welsh demonstrated, they did not mean what they said.

There are some cases, as the government argues (pp 4-5), where a registrant properly has been denied relief because his interpretation of a requirement was different from that of the Selective Service System and he elected to act upon his own interpretation without ascertaining that the system had a different one. Petitioner's case and *Taylor* and *Fargnoli* are not cases of a mistake in interpretation. They are cases where the plain meaning of the law was changed to include a class of conscientious objectors unconstitutionally excluded under the law as written. The First Circuit court in *Fargnoli* recognized this distinction and on this basis correctly reached a result opposite from that reached by the Fifth Circuit.

CONCLUSION

Certiorari should be granted. On the merits, the First Circuit decision in *Fargnoli* correctly analyzed and decided the issue involved in these cases. The decision below is unsound in law and unfair in result and should be reversed.

Respectfully submitted,
GARDNER W. BECKETT, JR.
Of Counsel for Petitioner

NELSON, BECKETT, NELSON & THOMAS
52 Sixth Street South
St. Petersburg, Florida 33701